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IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 242.

SAMUEL LUMIERE, *Appellant,*

vs.

MAE EDNA WILDER, INC., *Appellee.*

BRIEF FOR APPELLEE.

FREDERICK F. CHURCH,
Counsel for Appellee.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 242.

SAMUEL LUMIERE, *Appellant*,

vs.

MAE EDNA WILDER, INC., *Appellee*.

BRIEF FOR APPELLEE.

This is an appeal from a decision and order of the District Court for the Southern District of New York quashing service of process and dismissing the bill for want of jurisdiction. The appeal is taken under Section 238 of the Judicial Code on the certificate of Judge Learned Hand (p. 10 Trans.).

The facts appearing from the Transcript of the Record are as follows:

This is a suit in equity for alleged infringement of copyright.

Plaintiff is a resident of New York City, and defendant a corporation under the laws of New York

with its principal place of business at Rochester, New York, and is a resident of the City of Rochester in the Western District of New York (Fol. 3, p. 2 Trns.).

Defendant has no office or place of business, and no agent or representative in the Southern District of New York, and no person residing there has been designated upon whom service can be made. (Fol. 14, p. 6 Trans.)

The subpoena was served upon Thomas F. Adkin, President of the defendant corporation, but who is a resident of Rochester, N. Y. (Fol. 14, p. 6 Trans.) at the Hotel Biltmore in the City of New York in the Borough of Manhattan, by delivering a copy of the same to him while he was temporarily sojourning in that city. (Fols. 16-7, p. 7 Trans.)

Defendant's appearance on the motion to quash service was special and for that purpose only (Fol. 11, p. 5 Trans.).

The State of New York is divided into four districts—Eastern, Southern, Northern and Western, and New York City is in the Southern, and Rochester, the residence of the defendant, in the Western District (Sec. 96 U. S. Jud. Code).

The U. S. Judicial Code, approved March 3, 1911, provides as follows:

> *Sec. 51.* Except as provided in the five succeeding sections, no person shall be arrested * * * and except as provided in the six succeeding sections no *civil suit shall be brought in any district court against any person by any original process in any other district than that whereof he is an inhabitant*, but where the jurisdiction is founded *only* on the fact that the action is between citizens of different States, suit shall be brought only in

the district of the residence of either plaintiff or defendant.

Sec. 52. When a State contains more than one district, every suit *not of a local nature*, in the district court thereof, *against a single defendant*, inhabitant of such State, *must be brought in the district where he resides;* but if there are two or more defendants, residing in different districts of the State, it may be brought in either district, and a duplicate writ may be issued against the defendants, directed to the marshal of any other district in which any defendant resides. The clerk issuing the duplicate writ shall indorse thereon that it is a true copy of a writ issued out of the court of the proper district; and such original and duplicate writs, when executed and returned into the office from which they issue, shall constitute and be proceeded on as one suit; and upon any judgment or decree rendered therein, execution may be issued, directed to the marshal of any district in the same State.

The United States Courts have exclusive jurisdiction of Copyright cases, and this suit is therefore not of a "local nature" within the meaning of Section 52 of the Code *supra.*

Casey vs. Adams, 102 U. S. 66;
Wagner & Wilson, 225 Fed. 912.

The suit *not* having been brought against co-defendants, the prohibition of the section is to be given its full meaning.

Camp vs. Gress, 250 U. S. 308.

The mere fact that defendant's president was temporarily within the district when served does not confer jurisdiction upon this Court, nor make good the service of the subpoena.

Goldey vs. The Morning News, 156 U. S. 518;
Int. Harvester Co. vs. Kentucky, 234 U. S. 579;
Phila. & R. Ry. Co. vs. McKibben, 243 U. S. 264-5;
Peoples Tobacco Co. vs. Am. Tobacco, 246 U. S. 79;
Camp vs. Gress, 250 U. S. 308;
Rosenberg Bros. vs. Curtis Brown Co. (decided by Sup. Ct. Jan. 4, 1923, and not reported);
Goodhope Co. vs. Railway B. Fencing Co., 22 Fed. 635;
Wilkins vs. Queen City S. B. & T. Co., 154 Fed. 173;
Hoyt vs. Ogden Portland Cement Co., 158 Fed. 890;
Cody Motors Co. vs. Warren Motor Car Co., 196 Fed. 254;
Craig vs. Welch Motor Car Co., 165 Fed. 554.

Appellant evidently relies upon the fact that Judicial Code Sec. 256 vests in the United States Courts exclusive jurisdiction in copyright cases and upon the Copyright Act, March 4, 1909, C. 320, Sec. 35, which provides:

> *Sec. 35.* That civil actions, suits or proceedings arising under this Act may be instituted in the district of which the defendant or his agent is an inhabitant or in which he may be found.

As defendant appellee is a corporation and is not an inhabitant of the district in which the suit is brought, the only remaining question is whether it is "found" in the district within the meaning of this statute.

This Court has, in no uncertain terms decided, where a corporation can be "found" within the meaning of the Statutes.

In *Peoples Tobacco Co. vs. American Tobacco Co.*, 246 U. S., pp. 79-84, in referring to suits under the Sherman Act, this Court said:

> "Section 7 of the Sherman Act provides that suits of the character of the one under consideration may be brought in the district in which the defendant "resides or is found." When applied to a corporation this requirement is the equivalent of saying that it must be present in the district by its officers and agents *carrying on the business of the corporation.* In this way only can a corporation be said to be found within the district. In that manner it may manifest its submission to local jurisdiction and become amenable to local process."

The same question was decided in the same way in the following cases

International Harvester Co. vs. Kentucky, 234 U. S. 579;

Phila. & Reading Ry. Co. vs. McKibbin, 243 U. S. 264;

Chipman vs. Thos. B. Jeffery Co., 251 U. S. 373-9;

Rosenberg Bros. vs. Curtis Brown Co. (Jan. 4, 1923).

Notwithstanding the fact that in some of the cases above cited the question decided was with regard to the defendants being found within the *State* and did not specifically refer to the *district* within the State where there were two or more districts, the decision in *Peoples Tobacco vs. American Tobacco Co., supra,* is controlling and directly in point, as in that case the language of the Sherman Act requiring that suit may

be brought "in the district" is the same as that in both the Judicial Code and in the Copyright law above referred to.

Appellant's contention that the language of Section 35 of the Copyright Act means that a suit may be brought, not only in any district of which the defendant or his agent is an inhabitant, but in any district where either the defendant or his agent may be found, in the sense that either of them is "found" when served with process, is absurd and is contrary to reason and to the many authoritative decisions construing similar language.

The word "he" in the last clause of the Statute can only mean the defendant, and indicates the place where "he," if an individual, or "it," if a corporation, may be found. If it had been the intention of Congress to make such a radical change in the law and to permit a corporation, for instance, to be sued under this Act whenever one of its officers might be temporarily or casually sojourning, and contrary to a long line of precedents respecting the meaning of the word "found" as applied to corporations, the clause would have read "they or either of them may be found."

The statement in appellant's brief to the effect that it was the intention of Congress to change the status provided by Section 52 of the Judicial Code by the provision of the Copyright law, is completely answered by a consideration of the dates of the passage of the laws themselves, for the Copyright Law was passed in March, 1909, and the Judicial Code passed March 3rd, 1911 (Ch. 231, 36 St. L. 1087).

The judgment of the Court below quashing the service and dismissing the bill should be affirmed.

FREDERICK F. CHURCH,
Counsel for Appellee.

Office Supreme Court, U.
FILED
JAN 17 1923
WM. R. STANSBUR
CLERK

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1921.

SAMUEL LUMIERE,
Appellant,
against
MAY EDNA WILDER, INC.,
Appellee.
} No. 242.

Statement.

This appeal is taken under Section 238 of the Judicial Code (Barnes Federal Code, Section 1003) because the jurisdiction of the United States District Court for the Southern District of New York is the only question at issue.

Argument.

The question arises in a copyright case, and is in substance, did the District Court for the Southern District of New York get jurisdiction of a corporation residing in the jurisdiction of the District Court for the Western District of New York by the service of process upon an officer of the Company within the jurisdiction of the Southern District of New York.

The question must be determined by a construction of Section 35 of the Copyright Act. So far as we are informed this Court has never decided this question under the statute which is controlling in this case.

Section 35 of the copyright Act provides as follows:

> "Civil actions, suits or proceedings arising under this Act may be instituted in the District of which the defendant or his agent is an inhabitant, or in which he may be found."

There can be no question but that the President of the Company was the agent of the Company, and that he was served with process in the City of New York, within the Southern District of New York. If, then, jurisdiction can be acquired by service on defendant's agent within the district, the Court has jurisdiction in this case.

Under the plain meaning of the words of this law if the *president* of this Corporation was an inhabitant of the City of New York, within the Southern District of New York, the corporation could be sued in the Southern District of New York, notwithstanding the fact that the *defendant* was an inhabitant of the Western District of New York. The statute specifically says so. If it were otherwise the words of the section "or his agent" would be entirely superfluous.

We contend that the plain intent of Congress was, not only to give jurisdiction to the District Court in which the defendant or his agent was a resident, but also to any District Court in which the defendant or his agent may be found. The punctuation plainly shows that two contingencies were considered. One, the residence of the defendant or his agent, and two, the place where the

defendant or his agent was found and served with process.

We contend that the word "he " in the last clause refers to the "defendant or his agent" and that it means that civil actions under the Copyright Law may be instituted in the District in which the defendant's agent is found in the sense that he is served with process.

Any other interpretation with respect to a corporation would be impossible, since one can find or serve a corporation only in the person of its agent.

We are not unmindful of the many decisions under the Anti-Trust, the Patent and similar statutes, which have determined that a Corporation is not "found" in a district when one of its officers is temporarily in the district, even though he be conducting some incidental business of the Company. The distinction between these statutes in which these decisions have been made and the statute at bar is, that, at bar, by the very language of the statute it is provided that one can serve either the defendant or his agent, where either resides or is found, whereas this language is not used in any of the other statutes under consideration.

The manifest purpose of this enactment was to increase the protection that the copyright act was designed to provide for authors, and make it as convenient as possible for them to promptly and expeditiously enforce their rights.

If it was not the intention of Congress to change the status provided by Section 52 of the Judicial Code, this section of the Copyright Act would be unnecessary.

Cases decided under Section 52 of the Judicial Act can have no application for jurisdiction under

that section is limited to the district where the defendant "resides".

Cases under the Sherman Act are not in point (Barnes Federal Code Sections 79-61) for the language of that section is "the district in which the *defendant* resides or is found or *has an agent*". Having an agent in a district plainly means something definite and permanent and is distinctly in contrast with the situation where service may be made in the district where the "defendant *or his agent* resides or in which he may be found."

Cases under the Patent Law (Judicial Code, Section 48, Barnes Federal Code Section 810) are not in point. The language of that section is "the District Courts of the United States shall have jurisdiction * * * in the district of which the defendant is an inhabitant or in any district in which the defendant "shall have committed acts of infringement, and have a regular and established place of business." The distinction is manifest.

In conclusion we contend that the words of this Act shall be given their plain and usual meaning. That therefore when the service was made upon the President of the Corporation within the jurisdiction of the United States District Court for the Southern District of New York, the suit was instituted within the district in which the defendant's agent was found; hence the Court had jurisdiction, and the judgment of the District Court should be reversed and the cause remanded for further proceedings.

Respectfully submitted,

WILLIAMS S. EVANS,
Counsel for the Plaintiff in error,
46 Cedar Street,
New York City.

Office Supreme Court, U. S.
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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922

No. 242

SAMUEL LUMIERE, APPELLANT,

vs.

MAE EDNA WILDER, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPELLEES MOTION TO DISMISS UNDER RULE 21.

FREDERICK F. CHURCH,
Counsel for Appellee

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1922

SAMUEL LUMIERE,
Appellant,

vs.

MAE EDNA WILDER, INC.
Appellee.

NO. 242.

Messrs. Almy, VanGorden & Evans,
Attorneys for Appellant,
46 Cedar Street,
Borough of Manhattan,
New York City.

TAKE NOTICE that at the call of the above entitled case for argument on Thursday, the 18th of January, 1923, or at such other time as the case may be reached and called, I will present for the consideration of the Court the accompanying motion to dismiss the case under the provisions of Section 5 of Rule 21.

(Signed) FREDERICK F. CHURCH,
Attorney for Appellee.

Service of a copy of the annexed motion and affidavit, admitted this 13th day of January, 1923.

ALMY, VAN GORDON & EVANS,
Attorney for Appellant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1922

SAMUEL LUMIERE,
Appellant.

vs.

MAE EDNA WILDER,
Appellee.

NO. 242.

MOTION TO DISMISS UNDER RULE 21.

NOW COMES the appellee, Mae Edna Wilder, Inc. by Frederick F. Church, its attorney, and moves that the appeal in the above entitled case be dismissed under the provisions of Section 5 of Rule 21, no brief on the part of Appellant having been filed or served upon appellee's counsel, as shown by the accompanying affidavit.

(Signed) FREDERICK F. CHURCH,
Attorney for Appellee.

Rochester, New York,
January 12, 1923.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1922

SAMUEL LUMIERE,
Appellant,

vs.

MAE EDNA WILDER,
Appellee.

NO. 242.

AFFIDAVIT OF FREDERICK F. CHURCH.

County of Monroe, }
State of New York, } ss.:

Frederick F. Church, being duly sworn, deposes and says that he is a resident of Rochester, New York, a member of the Bar of the Supreme Court, and appears as attorney for the Appellee, Mae Edna Wilder, Inc. in the above entitled cause; that he is informed by the Clerk of the Court that the above entitled cause will in all probability be reached for hearing on or about the 18th day of January, 1923; that he has not been served with a copy of a brief on the part of appellant, and has not stipulated or agreed to receive shorter notice than is required by the Rule.

(Signed) FREDERICK F. CHURCH.

Subscribed and sworn to before me, a Notary Public, this 12th day of January, 1923.

(Seal)

ESTHER M. ENNIS,
Notary Public.